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THE HONORABLE FRED VAN SICKLE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

JAMES S. GORDON, JR,

Plaintiff,

v.

IMPULSE MARKETING GROUP, INC.,

Defendant

IMPULSE MARKETING GROUP, INC.,

Third Party Plaintiff

v.

BONNIE GORDON, JAMES S. GORDON, III, JONATHAN GORDON, JAMILA GORDON, ROBERT PRITCHETT, EMILY ABBEY, and LEW REED

Third Party Defendants

NO. CV-04-5125-FVS

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS AND THIRD PARTY DEFENDANTS UNDER FRCP 12(b)(6) OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT UNDER FRCP 56 OR IN THE ALTERNATIVE TO DISMISS UNDER FRCP (9)(b)

Jury Trial Demanded

COMES NOW the Plaintiff, James S. Gordon, Jr., and files this reply in

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support of Plaintiff's motion to dismiss counterclaims and claims against Third Party Defendants under FRCP 12(b)(6), or in the alternative for summary judgment under FRCP 56, or in the alternative to dismiss under FRCP (9)(b).

Introduction

Faced with a motion asking the Court to dismiss the Plaintiff's friends and family as Third Party Defendants (who have been sued purely as a result of their having witnessed the Defendant's illegal spamming activities in a prior lawsuit), the Defendant waited until 4:30 pm on day before their responsive brief was due and, instead of filing a responsive brief, instead filed an "amended" answer setting forth the same counterclaims and the same third party claims as their original answer, and moved to strike the Plaintiff's motion. The Court properly denied the Defendant's motion, and the Defendant subsequently filed its responsive brief, raising for the first time a challenge to the Plaintiff's "standing" to bring its' motion to dismiss, and for the first time asserting a counter motion for summary judgment. Accordingly, this reply will respond to the "standing" issue, the issues raised by the "amendments" to the Defendant's answer, and the Defendant's countermotion for summary judgment.

The Plaintiff Has Standing to Bring its Motion

Considerations of standing are normally made to determine whether a court

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has jurisdiction over parties before it, not to decide issues among parties properly before the court. "The essence of the standing question, in its constitutional dimension, is whether the plaintiff has alleged such a personal stake in the outcome of the controversy [as] to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Oregon Advocacy Center v. Mink* 322 F.3rd 1101 (9th Cir. 2003) quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260-61 (1977) (alteration in original)(internal quotation marks eliminated). In contrast, the standing issue as raised by the Defendant in the instant case turns these jurisdictional concerns on their head. The Defendant argues that the Plaintiff's lack of standing preserves, rather than defeats, the invocation of federal-court jurisdiction over the Third Party Defendants and justifies, rather than eliminates, the exercise of the court's remedial powers on the Defendant's behalf.

The Defendant cannot have it both ways. Having invoked this Court's jurisdiction over the Third Party Defendants by naming them to this action, the Defendant should be barred from invoking any doctrine rooted in defeating that same jurisdiction, particularly when it is invoked for the sole purpose of preventing the Court from considering the merits of the Defendant's claims. The court should therefore ignore the Defendant's fake concern about protecting the interests of

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people they have sued. The Third Party Defendants are perfectly capable of seeking redress with the Court if they harbor any objections to the Plaintiff's bringing this motion, or the Court's eventual ruling.

In any event, it is clear that the Plaintiff's motion survives a traditional standing analysis. As set forth by the 9th Circuit, "Together, the constitutional and prudential components of standing insure that plaintiff's possess "such a personal stake in the outcome of the controversy to insure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Oregon Advocacy Center v. Mink* 322 F.3rd 1101 (9th Cir. 2003) quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962). The Plaintiff possesses exactly such a personal stake. One of the Third Party Defendants is the Plaintiff's wife, and three more are his children. Accordingly, the Defendant's claim that the Plaintiff "has no personal stake in the outcome of its claims against the Third Party Defendants" is pure sophistry, as it completely ignores these familial relationships.

With respect to Third Party Defendants Robert Pritchett and Emily Abbey, the Defendant itself asserts in its brief that the very fact that the Defendants are pursuing claims against these individuals may give rise to claims by them against the Plaintiff. As such, according to the Defendants, the Plaintiff has a direct

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economic interest in defeating the Defendant's claims against these parties. Further, it "has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262-63 (1977) (internal citations omitted). Third Party Defendants Robert Pritchett and Emily Abbey have been named in this suit purely as a result of their being witnesses to the Defendant's bad acts in a prior lawsuit, which in turn came about as a result of their friendship with the Plaintiff and their use of the Plaintiff's interactive computer services. The Plaintiff therefore has an obvious interest in protecting them from the Defendant's vexatious litigation resulting from that friendship and their use of his interactive computer service, and has standing to bring this motion in furtherance of those ends.

The Defendant's Amendments to the Claims and Counterclaims are insufficient to prevent dismissal under FRCP 12(b)(6) or summary judgment under FRCP 56

The legal basis for each of the counterclaims and third party claims set forth against the Plaintiff in the "amended" answer is the same as those of the original answer. The sole difference between the two versions are two new factual allegations which contradict each other, and each of which has already accepted as

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true for purposes of the Plaintiff's pending motion.

The first new allegation is that the Plaintiff "misrepresented his identity" when he responded to advertisements for free products on the internet by "representing to the Defendant" that he was each of the Third Party Defendants. Assuming such conduct to be true, all it amounts to is an allegation that Mr. Gordon signed his friends and family up to receive a free gift. This conduct simply is not actionable, particularly by the Defendant, nor does it give rise to the application doctrine of "unclean hands" as argued by the Defendant.

In the first instance, this information was NOT given to the Defendant. As alleged in the Defendant's answer, the information was given to the unidentified individuals who ran the websites identified in the Defendant's answer and whom the Defendant characterizes as its "marketing partners." In the second instance, all of the evidence before the Court indicates that any information given to these unidentified individuals was true and accurate.

In the affidavit of James S. Gordon, Jr., Mr. Gordon plainly sets forth that he used a variety of different emails that he shared with each of the Third Party Defendants to request free products. Each of these email addresses were valid, operating email addresses, and the information given to the unidentified individuals who ran these websites was thus true and accurate information. In other words, the

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Plaintiff did exactly what he was invited to do by these websites; he signed up to receive a free gift, and gave the websites true and accurate information including working email addresses. This is not "misconduct" that gives rise to the application of the doctrine of unclean hands.

The Defendant then somehow acquired that information, and, without the permission of the Plaintiff or any of the recipients, began using it to send illegal spam to the Plaintiff and the Third Party Defendants. The Defendant obviously doesn't like the fact that it is being sued for sending that illegal spam, but the Defendant's frustration doesn't give rise to a cause of action.

With respect to the Third Party Defendants, the only difference between the Defendant's original answer and the "amended" answer are repeated and bizarre allegations that each of the third party defendants "fraudulently represented" that they were none other than themselves. For example, paragraph 15 of the Defendant's third party complaint in the "amended" answer contains a typical allegation. It states:

> "On September 16, 2003, Third Party Defendant, Jonathan Gordon, opted-in to receive email at the website located at www.homeforfreestuff.com fraudulently representing to Third Party Plaintiff, or its marketing partners,

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that he was Jonathan Gordon."

In other words, the Defendant has now alleged that Jonathon Gordon represented that he was none other than Jonathon Gordon, and that somehow this constitutes "fraud." The Plaintiff is unable to discern how it is possible for a person to represent oneself as oneself "fraudulently." While there is no evidence that any of the Third Party Defendants "opted-in to receive email," even if this allegation is accepted as true, it still does not constitute "fraud" or give rise to any cause of action.

Thus, assuming the Defendant's allegations to be true, the Third Party Defendants did exactly what they were invited to do by these websites; they signed up to receive a free gift, and gave the websites true and accurate information as to their identity, including working email addresses that they shared with the Plaintiff. This is not "misconduct" that gives rise to the application of the doctrine of unclean hands. Again, the Defendant obviously doesn't like the fact that it is being sued for sending illegal spam to those email addresses, but the Defendant's frustration doesn't give rise to a cause of action against the Third Party Defendants.

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The Defendant's Cross Motion for Summary Judgment Should be Denied

The Defendant has filed a cross motion for summary judgment asking the court to rule that R.C.W. §19.190 et seq. "only protects Gordon's individual "electronic mail address" and does not protect any other "electronic e-mail addresses" located at the Domain." This allegation is flatly contradicted by RCW §19.190.040(2) which states:

> Damages to an interactive computer service resulting from a violation of this chapter are one thousand dollars, or actual damages, whichever is greater.

An "interactive computer service" and an "internet domain name" are defined at RCW §19.190.010(7) and (8), which read:

> (7) "Interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions.
>
> (8) "Internet domain name" refers to a globally unique, hierarchical reference **to an internet host or service**, assigned through centralized internet naming authorities, comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy. (emphasis added)

Plainly, the legislature explicitly gave an "interactive computer service" a cause of action for all violations of the Act associated with its "internet domain name." The Plaintiff has pled that it is an "interactive computer service" as that term is defined in the statute, and is entitled to recover $1,000 damages for all

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commercial electronic email sent to the interactive service's domain that violate the statute. Finally, there is no evidence whatsoever that the legislature intended to limit any internet user in the State of Washington to the use of a single email address, or to limit their recovery for damages for violations of R.C.W. §19.190 et seq. to a single email address.

CONCLUSION

The Plaintiff respectfully requests that the Court grant the Plaintiff's motion to dismiss the Defendant's counterclaims against the Plaintiff and claims against the Third Party Defendants under FRCP 12(B)(6), or in the alternative grant summary judgment under FRCP 56, or in the alternative dismiss under FRCP (9)(b). The Plaintiff further respectfully requests that the Court deny the Defendant's motion to hold that R.C.W. §19.190 et seq. only protects a single "electronic mail address" for an individual, and does not protect an interactive service provider.

DATED this 30th day of September, 2005

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Certificate of Service

I hereby certify that on September 30, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Floyd Ivey, Peter J. Glantz. I hereby certify that I have served the forgoing to the following non-CM/ECF participants by other means: Bonnie Gordon, Jonathan Gordon, James S. Gordon, III, and Robert Prichett. I hereby certify that I have served the forgoing to the following persons who are non-CM/ECF participants named in this lawsuit, but who have not yet been served or entered an appearance in this lawsuit by other means: Emily Abbey and Jamila Gordon.

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